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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FARMERS INSURANCE EXCHANGE, Plaintiff and Respondent, v. JULIE DODD, Defendant and Appellant.	B169060 (Los Angeles County Super. Ct. No. BC 289188)

APPEAL from the judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed.

Mancini & Associates, Marcus A. Mancini, Adam Jason Reisner; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Defendant and Appellant.

Berger Kahn, Allen L. Michel and Bruce M. Warren for Plaintiff and Respondent.

Julie Dodd appeals from the summary judgment entered in favor of plaintiff Farmers Insurance Exchange, granting declaratory relief that Dodd was not entitled to underinsured motorist coverage under the terms of her Farmers auto insurance policy. For the reasons set forth below, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Julie Dodd was one of several persons injured in a December 1999 chain-reaction, multiple-car collision. Dodd was a passenger in one of the cars and was not at fault for the accident. She was seriously injured and suffered damages greater than $100,000. Dodd and 10 others injured in the accident sued the at-fault driver, who admitted liability. The at-fault driver's insurance company tendered the limits of its insured's policy, which provided liability coverage of $300,000 per person, with a lid of $500,000 per accident.

Dodd's auto insurer was Farmers Insurance Exchange (Farmers). Her policy provided uninsured motorist coverage. It also provided coverage for injuries caused by an underinsured motorist. Pursuant to Insurance Code section 11580.2, subdivision (n), Farmers defined an underinsured motorist as one who possessed automobile liability insurance, but in amounts less than those provided as coverage for uninsured motorists in Dodd's own policy. Dodd's uninsured motorist coverage had a limit of $100,000 per person and $300,000 per accident.[1]

Because there were 10 other plaintiffs suing the at-fault driver, it became apparent to Dodd and her lawyer that the at-fault driver's policy limits would not cover Dodd's damages. Dodd's lawyer, David Samuels, contended that the underinsured motorist provision in Dodd's policy should be construed to cover situations such as this, where even though the at-fault driver's policy had limits higher than Dodd's, the at-fault driver was effectively underinsured because he had injured so many other people who staked a claim to his policy's coverage. Between February and August of 2001, Samuels and

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[1] Accordingly, by the terms of Dodd's policy, the at-fault driver had not been underinsured.

Farmers claim representatives either corresponded or spoke by phone about Dodd's claim. In February of 2001, one claims representative wrote that it did not appear Dodd qualified for underinsured motorist coverage, but asked Samuels to send a copy of Dodd's complaint against the at-fault driver if she intended to seek such coverage. According to Samuels, that representative later concurred with Samuels's interpretation of the underinsured motorist coverage and agreed to keep Dodd's claim open. Samuels believed that Farmers was agreeing to provide the coverage. Over the next few months, Samuels received letters from Farmers representatives asking him to submit a demand package as a prelude to settlement negotiations. As part of Samuels's correspondence with Farmers, he advised Farmers that Dodd was taking part in a mediated settlement process, expected to receive less than the amount of her damages from that process, and would thereafter submit her coverage claim.

On August 21, 2001, Dodd and the 10 other plaintiffs injured by the at-fault driver settled their actions at a mediation conference. The at-fault driver's $500,000 policy limits were apportioned among the 11 plaintiffs on a pro-rata basis, with each receiving less than one-third their damages. Dodd received $13,000 from this process. After the settlement, Samuels submitted Dodd's claim for underinsured motorist coverage to Farmers. Farmers denied the claim because the at-fault driver's policy limits were too high for him to qualify as an underinsured motorist.

When Dodd persisted in seeking coverage, Farmers sued for declaratory relief to establish that Dodd was not entitled to underinsured motorist coverage. Farmers moved for summary judgment, contending that the terms of the policy and the coverage limits of the at-fault driver combined to preclude Dodd's coverage claim. Dodd opposed the summary judgment motion, contending that Farmers was equitably estopped to rely on the policy terms because Farmers had led her to believe it would not deny coverage, causing her to settle for far less than her actual damages.[2] According to Dodd's

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[2] Dodd opposed the motion on two other grounds: the underinsured motorist provision could be construed to cover her claim, and Farmers did not need to seek

opposition declaration, she "opted to forego greater opportunity for settlement with the Faulty Driver above and beyond his policy limits in the underlying action, in reliance on Farmer's representations that they were allowing me to make a claim under my underinsured policy." Had she known Farmers would not provide the underinsured motorist coverage, she "would not have agreed to settle [the] underlying action for the insufficient amount of the Faulty Driver's Policy, but instead would have attempted to seek greater sums of money above the policy." The trial court granted Farmers' motion and entered judgment for Farmers. This appeal followed.

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A plaintiff moving for summary judgment must show that there is no defense to its cause of action. (Code Civ. Proc., § 437c, subd. (a).) The plaintiff meets this burden by proving each element of its cause of action. Once the plaintiff does so, the burden shifts to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (Code Civ. Proc., §437c, subd. (p)(1).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of

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declaratory relief because it had other remedies available. Dodd does not address those issues on appeal and we therefore deem them waived.

fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

DISCUSSION

On appeal, Dodd no longer challenges Farmers' interpretation of the underinsured motorist provision. As a result, she effectively concedes that she was not entitled to coverage under the terms of her policy and that Farmers' summary judgment motion shifted to her the burden of raising a triable issue of fact sufficient to defeat the motion. According to Dodd, she did so through evidence that Farmers' conduct in leading her to believe it would not deny her claim equitably estopped Farmers from denying coverage.

The doctrine of equitable estoppel is found in Evidence Code section 623,which provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." A party raising this defense must establish the following elements: (1) the party estopped must know the facts; (2) the party estopped must engage in conduct intended to be acted upon by the party being estopped; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) injury must result from reliance on the other's conduct. (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 437-438.) The party claiming estoppel bears the burden of proving all four elements. The doctrine is strictly applied and must be substantiated in every particular. (*Id.* at p. 438.) As set forth below, we believe Dodd failed to raise a triable issue on the last element--that Farmers' conduct resulted in any injury to her.[3]

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[3] Because we affirm on this basis, we need not consider Dodd's contentions concerning the other three elements of equitable estoppel. For purposes of our decision, we assume, but do not decide, that Farmers' conduct and statements led Dodd to settle with the at-fault driver. As we explain, however, she has produced no evidence to show that she could have obtained more money from the at-fault driver had she known Farmers

The detrimental reliance element of equitable estoppel is a causation-related test. (*Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1548 [in seeking to recover sums paid to settle lawsuit, insured seeking to estop insurer from denying coverage had to show that insurer's conduct caused it to settle]; *Forman v. Scott* (1964) 231 Cal.App.2d 340, 344 [estoppel occurs where one party's conduct causes another to rely on that conduct and take action to his detriment]; *Fleishbein v. Western Auto Supply Agency* (1937) 19 Cal.App.2d 424, 428 [party claiming estoppel must show he would not have changed his position "but for" the conduct of the other party].)

The only evidence of injury resulting from Dodd's reliance on Farmers' conduct is in Dodd's declaration, where she states that she "opted to forego greater opportunity for settlement with the Faulty Driver above and beyond his policy," and that she "would not have agreed to settle . . . for the insufficient amount of the Faulty Driver's Policy, but instead would have attempted to seek greater sums of money above the policy." Dodd does not state in her declaration--and does not contend on appeal--that she would have taken the case to trial. Instead, the only fair interpretation of her declaration is that she would have tried to settle for more money. In order to raise a triable issue on that point, Dodd was required to produce evidence that she could have obtained a better settlement. (*State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1629 [insured homebuilders were sued for defective construction and settled with plaintiffs for $10,000; in action against their insurer, they claimed insurer was estopped to deny coverage, and tried to show detrimental reliance through their failure to hire independent counsel to represent their interests. Appellate court rejected the contention because there was no showing that separate counsel might have obtained a better settlement]; see *Barnard v.*

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would deny her claim for underinsured motorist coverage. Dodd also contends that the trial court erred by sustaining Farmers' objections to several portions of her and Samuel's declarations in opposition to the summary judgment motion. Most of those objections concerned the issue of whether Samuels and Dodd properly construed Farmers' conduct as an agreement to provide the disputed coverage. For purposes of our decision, we assume, but do not decide, that all of Dodd's opposition evidence was admissible, and have considered all her evidence.

Langer (2003) 109 Cal.App.4th 1453, 1461-1462 (*Barnard*) [in legal malpractice action, nonsuit of plaintiff was proper where plaintiff's proposed evidence did not show that but for lawyer's negligence, he would have settled for more or gone to trial and obtained a larger recovery; the mere possibility of obtaining more was speculative and insufficient].)[4]

Dodd and the 10 other plaintiffs injured in the accident settled with the at-fault driver for their respective pro rata shares of the at-fault driver's policy limits. This raises an inference that no other funds were available for settlement. Dodd said in her declaration that she passed on a "greater opportunity" for a better settlement and "would have attempted to seek" more money. Missing is any evidence showing that such an opportunity existed and could have been exploited. There is no evidence that the at-fault driver had any money available for settlement apart from his policy limits. Nor is there evidence to suggest that any of the 10 other plaintiffs would have accepted less than their pro rata shares in order to free up more money for Dodd. Absent such evidence, Dodd's statements do not even rise to the level of possibility. Instead, they represent no more than a hope, based on unsubstantiated speculation. Because there is no evidence to raise a triable issue that her reliance on Farmers' conduct caused her to suffer any injury, summary judgment was properly granted.

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[4] Dodd contends *Barnard* is inapplicable because it is a legal malpractice action. We disagree. As noted above, detrimental reliance is essentially a causation of damages question, which was precisely the point of the holding in *Barnard*.

DISPOSITION

For the reasons set forth above, the judgment is affirmed. Respondent to recover its costs on appeal.

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RUBIN, ACTING P.J.

We concur:

BOLAND, J.

FLIER, J.